SUPREME COURT, U.S.
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CASE NO. 94-1151

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

Bertha Lee Footman and
Beresford Robinson,
Individually and as
Co-Personal Representatives
of the Estate of Charlene
I. Robinson, deceased,

Petitioners,

vs.

United States of America,
National Aeronautics and Space
Administration,

Respondents.

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

# PETITIONERS' REPLY BRIEF

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## QUESTIONS PRESENTED FOR REVIEW

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

## TABLE OF CONTENTS


Argument

Point I 1-4

Point II 4-7

Conclusion 7


## TABLE OF AUTHORITIES

**CASES:**


Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986) 1

Ayer v. United States 902 F.2d 1038 (1st Cir. 1990) 6

Baum v. United States, 986 F.2d 716 (4th Cir. 1993) 6

Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988) i

Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994) 3

Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) i

Fisher Brother Sales, Inc. v. United States, #93-1182 (3rd Cir. Jan. 25, 1995) (en banc), 1995 WL29865 2

Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942) 1

Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) i, 1, 3

Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993) 5

United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991) i, 2

United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984) i, 2

**STATUTES**

28 U.S.C. 1346(b) 1

28 U.S.C. 2671 et seq. 2

## ARGUMENT

### POINT I

The United States' assertion that Petitioners confuse "two quite separate issues" (OP7), with reference to the application of this Court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), misses the point made by Petitioners in every court in which this question has been argued. Petitioners have no argument with the assertion that the good samaritan rule is a principle of tort liability.[1] What the United States has failed to acknowledge is that the relationship between the discretionary function exception to the Federal Tort Claims Act [28 U.S.C. 1346(b), 2671, et seq.] and the Good Samaritan Rule is a temporal relationship. As this Court recognized in Indian Towing, it is not until after the government's discretionary decision is made and the activity engaged in, that the duty imposed by Indian Towing on government engaging in day-to-day operations arises.

In this case, that discretionary decision to operate the swimming facility was made decades before Charlene

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[1]As speculated by the Respondent, the law of Florida does impose a good samaritan rule on government: Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942) (City operating park with bathing beach owes duty to exercise due care for safety of persons invited there); Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986) (Once government decides to operate a swimming facility, it assumes a common-law duty to operate the facility safely, just as a private individual is obligated under like-circumstances).

Robinson's death. The day-to-day operations of the swimming facility had already resulted in two previous deaths prior to that of Charlene Robinson. Outside of the regulatory area, Petitioners have found no authority that would make day-to-day decisions concerning the operating of a recreational facility which charges an entrance fee to members of the public subject to the discretionary function exception.

In attempting to bolster its argument, the United States has failed to address the distinction between those cases involving the regulatory functions of government,[2] and those cases involving the non-regulatory exercise of discretion in the day-to-day operations of the government or its instrumentalities. This case clearly did not involve the type of regulatory activity that is seen in cases such as Gaubert, and Varig Airlines. Here, the discretionary decision to operate the facility was made more than 20 years before this child's death.

In its opposition, the government indicates reliance on cases which are distinguishable. In Fisher Brother Sales, Inc. v. United States, #93-1182 (3rd Cir. Jan. 25, 1995)(en banc), 1995 WL29865, Plaintiffs challenged the decision of the Commissioner of the Food and Drug Administration, an agency head, as opposed to a decision of a low-level "handy man" who

[2]United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991); United States v. Varig Airlines, 467 U.S. 797 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984).

was not even on the United States' payroll. Fisher Brothers Sales, involved an imminent threat to the public health of the United States with a compressed time period, not the negligent implementation of a decision to operate a recreational facility made more than two decades before. Further, this case involved the exercise of the government's regulatory function, as discussed above, rather than day-to-day activities in the operation of a facility open to paying guests.

Respondent also indicates reliance on the decision in Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994), which is clearly factually distinguishable. Black Hills Aviation dealt with a one-time event, a plane crash, and the compressed time period following that crash concerning the investigations conducted by the government, not the decades-long operation of a recreational facility. Black Hills Aviation contained clear national security implications, as opposed to the operation of a public swimming facility. Finally, the court in Black Hills Aviation, interpreted this court's decision in Indian Towing in a manner which was in conflict with cases decided by the Second and Fifth Circuit Courts of Appeals. Thus, this case cannot have any persuasive effect on the determination of this question, but again illustrates the need for this Court to provide for uniformity in the various circuits on this question.

The United States has failed to demonstrate the manner in which this Court's decision in Indian Towing does not apply to these facts. On the one hand, the government's negligent failure to maintain a light house years after the discretionary decision was made to operate that facility is actionable. On the other, the United States insists that the negligent failure of its agents to safely operate a swimming facility decades after the discretionary decision to operate that facility was made is not actionable. There is no rational basis given by the United States to allow the barge company to recover for damages to its vessel in one instance, and to deny recovery to the survivors of this drowned child in the other.

## POINT II

Petitioners have no quarrel with the "black letter" law explicating the analytical model used to determine whether application of the discretionary function exception is mandated in a particular factual situation (OP4-5).

However, the United States fails to address the absence of any evidence to support the District Court's finding that the challenged decisions regarding the lifeguards "involved safety factors and resource allocation" (OP5). As the evidence extracted in the petition clearly showed, the "employee", did not receive a government paycheck; was not allowed to serve on his employer's policy-making body; did not make budgetary

decisions; and was not even allowed to manage the receipts of the park he managed. In the face of this uncontradicted evidence, the unsupported conclusion that his decisions "involved safety factors and resource allocation" finds no support in the record.

The cases upon which the United States relies to support its argument on this point are distinguishable. In Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993), a rafting trip leader fell on a natural rock formation in a national monument area and brought claim against the government for its negligent failure to warn of the danger and the negligent rescue efforts. The Court determined the discretionary function exception applied to the facts of that case.

There, a remote natural site was involved. In the present case, the site was specifically created by the United States, surrounded by a fence, and staffed with employees called "lifeguards" for the explicit purpose of saving the lives of drowning children. In Kiehn, there were limited resources available, while in the present case adequate personnel had been budgeted to handle the emergency if properly trained and not negligent. In Kiehn, with reference to the failure to warn claim, the decision not to take action is one that is clearly discretionary. Here, the United States determined to act and then engaged in day-to-day operations which ultimately caused

three deaths. This case illustrates the different interpretations of the application of the discretionary function exception among the circuits.

In Baum v. United States, 986 F.2d 716 (4th Cir. 1993), the persons claiming against the government were occupants of a car that went through a guardrail on a National Park Service parkway and brought claim for negligent construction and design, involving the choice of materials, and for negligent repair, in the replacement of the guardrails. The courts determined those choices were protected by the discretionary function exception. Clearly, questions dealing with the design and construction of a facility are discretionary, where the decisions involving the day-to-day operations of a swimming facility do not involve that kind of discretion. In Baum, the question was of an initial allocation of resources, unlike the negligent use of resources already allocated in the present case.

In Ayer v. United States, 902 F.2d 1038 (1st Cir. 1990), a civilian visitor was injured in a fall at an Air Force missile launch facility and brought claim alleging negligent failure to make safety changes to protect invited guests. The court held the discretionary function exception protected that decision. Again, a discretionary decision not to employ safety appliances (guardrails), was explicitly based on policy criteria to allow the facility to survive a nuclear attack. In the present case, the

ongoing staffing and operation of the recreational facility did not involve any of those kinds of policy considerations. In Ayer, clear national policy implications were involved, versus the day-to-day operations of a recreational facility which were involved in this case.

The United States has been successful in surrounding the kernel at the core of this case with layers of rhetoric about the discretionary function exception. When all of those layers are peeled away, what is left is that the life of a seven year old child was sacrificed because of negligent decisions made in the day-to-day operation of the recreational facility. The evidence was clear that resources had been allocated to properly staff and operate the facility and that was not done.

## CONCLUSION

This court must accept jurisdiction of this cause to fully review the facts and circumstances surrounding this case; to reestablish the principle that, when the United States voluntarily determines to engage in an activity, the day-to-day operations which are negligently performed are not protected by the discretionary function exception; and, alternatively to issue a decision giving all courts in the system guidance as to the level beyond which discretion based on considerations of social, economic, and political issues may not reach.

Respectfully Submitted,

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